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COMMENTS

A PLAGUE ON BOTH YOUR HOUSES: CHALLENGES TO THE ROLE OF THE INDEPENDENT COUNSEL IN A PRESIDENTIAL IMPEACHMENT

I. INTRODUCTION

The year 1998 brought the first impeachment of a President in over a century.¹ For the first time, an independent counsel initiated consideration of such a process. The recent inquiry into the conduct of President Clinton allows the observation of the office of Independent Counsel in action, and raises serious constitutional questions regarding impeachment. What role should an officer of the executive branch have in the potential removal of the head of the executive branch? What relief can a President seek against a Congress that fails to discharge properly its constitutional obligations? What defenses can Congress make against such a claim for relief? The political events of 1998 and 1999 exposed a confluence of serious holes in impeachment theory and prosecutorial statutes, which, if exploited could lead to a serious constitutional crisis.

This comment details the role of the Independent Counsel in the impeachment process, from creation of the office to the constitutional mechanisms employed by Congress. Section II examines the justiciability of judicial review of a congressional impeachment action against the President. Case law on impeachment, the text of the Constitution, and the writings of the Founding Fathers support judicial review of such a case. Section III outlines the case an impeached or convicted President could make

1. In 1868 the House of Representatives impeached President Andrew Johnson. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 27 n.3 (1996). In 1974 the House Judiciary Committee voted to recommend articles of impeachment against President Richard Nixon. See *id.* at 54-55.

seeking relief from Congress. Finally, Section IV describes the application of the Independent Counsel Statute to the case of President Clinton. The added dimension of the Independent Counsel, something the Supreme Court has not yet considered in an impeachment case, exposes a dangerous inconsistency in the constitutional theory of impeachment.

II. THE IMPEACHMENT PROCESS

"Impeachment" is the colloquial term for the process of indictment and removal from office. The Constitution places this procedure largely in the hands of Congress.² After Watergate, however, the executive branch was given a role, albeit unintentionally.³ In 1978, Congress created the Office of Independent Counsel.⁴ This action was designed to codify the role of special prosecutors Archibald Cox and Leon Jaworski in Watergate.⁵ The statute gives the Independent Counsel, an executive branch officer, a key role in the impeachment saga.⁶ The Independent Counsel, through her statutory responsibility to report "any substantial and credible" evidence of potentially impeachable offenses to Congress, can force an impeachment issue upon an unwilling Congress.⁷

A. *The Independent Counsel*

The Ethics in Government Act of 1978 created the mechanisms of the Office of Independent Counsel.⁸ The Act received several renewals in the 1980s and 1990s, and is scheduled to expire on June 30, 1999.⁹ The statute allows for inquiries into government officials separate from the normal functioning of the Department of Justice ("DOJ").¹⁰ An independent counsel investigates high ranking officials in the government when such an inquiry by the DOJ would create a conflict of interest.¹¹ The statute lists the President first among its list of covered officials.¹²

Whenever the Attorney General receives "information sufficient to constitute grounds to investigate"¹³ the President, or any other covered official, she must

2. See U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6.

3. See 28 U.S.C. §§ 591-599 (1994).

4. See 28 U.S.C. § 591.

5. See *U.S. v. Nixon*, 418 U.S. 683 (1974) (regarding proceedings of special prosecutor investigation into Watergate); BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 61-71 (1976).

6. See 28 U.S.C. §§ 591-599 (1994).

7. *Id.* § 595(c). "An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment." *Id.*

8. See 28 U.S.C. §§ 591-599 (1994).

9. See *id.*

10. See *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting).

11. 28 U.S.C. § 591(e) (1994).

12. See *id.* § 591(b)(1).

13. *Id.* at § 592(c)(2).

conduct a preliminary investigation for ninety days.¹⁴ If after this ninety-day period she determines that there are “reasonable grounds” for continued investigation, she must submit an application to the court, which the “special division” will review to determine the necessity of an independent counsel.¹⁵ The special division consists of a three judge panel of the United States District Court for the District of Columbia.¹⁶ The panel appoints an attorney with “appropriate experience” to carry out the investigation in a “prompt, responsible and cost-effective manner.”¹⁷ The special panel also sets the parameters for the investigation with the ability to expand the scope upon request by either the Attorney General or the Independent Counsel.¹⁸

Additionally, Congress may initiate an independent counsel investigation through the Attorney General.¹⁹ The Judiciary Committee of either the House or the Senate may ask the Attorney General to apply to the special division for an appointment.²⁰ The Attorney General then has thirty days to begin a preliminary investigation, after which she must either request the appointment of an Independent Counsel or file a report with the special division detailing why she did not request an appointment.²¹

Once installed, an Independent Counsel receives a broad grant of investigative powers.²² She may, for example, convene a grand jury, grant immunity, inspect tax returns, and receive national security clearances.²³ She also may hire such staff as she deems necessary.²⁴ Most importantly, the office has few budgetary restrictions.²⁵ Upon appointment, only the Attorney General may remove an Independent Counsel from office.²⁶ Such a removal can only take place for “good cause, physical or mental disability,” or any other impairing condition.²⁷ Finally, the Ethics in Government Act states that the “[I]ndependent [C]ounsel shall advise the House of Representatives of any substantial and credible information . . . that may constitute grounds for an impeachment.”²⁸ This provision affords little flexibility. “Shall” in the statute means “must,” thrusting the question of impeachment on the House.

14. *See id.* § 592(a)-(c).

15. *See id.*

16. *See* 28 U.S.C. § 49; *Morrison v. Olson*, 487 U.S. 654, 661 (1988).

17. 28 U.S.C. § 593(b)(2) (1994).

18. *See id.* § 593(c).

19. *See id.* § 592(g).

20. *See id.* § 592(g)(1).

21. *See id.* § 592(g)(2).

22. *See id.* § 594.

23. *See* 28 U.S.C. § 594(a)(1)-(10) (1994).

24. *See id.* § 594(c).

25. *See Morrison v. Olson*, 487 U.S. 654, 714 (1988) (Scalia, J., dissenting) (noting that in 1987, four independent counsel investigations ongoing at the time spent five million dollars, ten percent of the Criminal Division of the Department of Justice budget). In 1989, the Criminal Division requested a budget of fifty-two million dollars with an additional seven million dollars for independent counsel, over one-eighth of the budget for the Criminal Division. *See id.*

26. *See* 28 U.S.C. § 596 (1994).

27. *Id.* § 596(a)(1).

28. *Id.* § 595(c).

B. The Congress

Alexis de Tocqueville studied the impeachment power granted to Congress in the Constitution and predicted in *Democracy in America* that it would be used frequently.²⁹ Contrary to de Tocqueville's belief, the House of Representatives has impeached only sixteen federal officials in over two hundred years.³⁰ Of those sixteen, the Senate convicted seven,³¹ acquitted six,³² and failed to complete action on three.³³

The roles of the two Houses of Congress compare easily to the roles of the two juries in a criminal trial. As a grand jury brings indictments, the House of Representatives brings impeachments.³⁴ As a trial jury passes judgement, the Senate holds a trial to determine the innocence or guilt of the charged party.³⁵

1. The House

The impeachment process in the House of Representatives can begin on the initiative of any member who introduces an impeachment resolution.³⁶ Two additional statutory methods can launch an impeachment. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 allows the Judicial Conference to certify to the House that Congress should consider impeachment of a

29. See GERHARDT, *supra* note 1, at 23.

30. See *id.* at 195 n.3. The fifteen officials prior to President Clinton were: Senator William Blount of Tennessee (1798-99); U.S. District Judge John Pickering of New Hampshire (1803-04); Supreme Court Justice Samuel Chase (1804-05); U.S. District Judge James Peck of Missouri (1826-31); U.S. District Judge West Humphreys of Tennessee (1862); President Andrew Johnson (1867-68); Secretary of War William Belknap (1876); U.S. District Judge Charles Swayne of Florida (1903-05); Commerce Court Associate Justice Robert Archbald (1912-13); U.S. District Judge George English of Illinois (1926); U.S. District Judge Harold Louderback of California (1932-33); U.S. District Judge Halsted Ritter of Florida (1936); U.S. District Judge Harry Claiborne of Nevada (1986); U.S. District Judge Alcee Hastings of Florida (1988-89); and U.S. District Judge Walter Nixon of Mississippi (1988-89). See *id.*

31. See *id.* at 185 n.4. Those convicted were all judges: Judge Pickering (drunkenness and senility); Judge Humphreys (support of the Confederacy considered rebellion against the nation); Judge Archbald (bribery); Judge Ritter (kickbacks and tax evasion); Judge Claiborne (tax evasion); Judge Hastings (bribery); and Judge Nixon (false statements to a grand jury). See *id.* All were removed from office, and the Senate also disqualified Humphreys and Archbald from holding any future office of honor or trust in the United States. See *id.*

32. See *id.* at 185 n.5. Those acquitted include Associate Justice Chase, Judge Peck, President Johnson, Judge Swayne, Judge Louderback and President Clinton. See *id.*; see also Peter Baker & Helen Dewar, *Clinton Acquitted; Two Impeachment Articles Fail to Win Senate Majority; Five Republicans Join Democrats in Voting Down Both Charges*, WASH. POST, Feb. 13, 1999, at A1.

33. See GERHARDT, *supra* note 1, at 23. Senator Blount had his impeachment resolution dismissed by the Senate for lack of jurisdiction. See *id.* at 185. He argued successfully that he was not a "civil officer," of the United States and thus not subject to impeachment. See *id.* at 48. The Senate agreed, and dismissed the House resolution for lack of jurisdiction. See *id.* The Blount case established that senators cannot be impeached, a proposition that has not been challenged since Blount's case in 1797. See *id.* Blount was, however, expelled from the Senate, a punishment both Houses of Congress hold over their members. See *id.* at 47-48. Secretary of War Belknap resigned his office two hours before the House voted successfully to impeach him. See *id.* at 23. The Senate voted not to convict him on the grounds that the body did not have jurisdiction to try an individual no longer in office. See *id.* at 23-24. Judge English resigned six days before his scheduled Senate trial, and his impeachment resolution received no action. See *id.* at 24.

34. See U.S. CONST. art. I, § 2, cl. 5.

35. U.S. CONST. art. I, § 3, cl. 6.

36. See GERHARDT, *supra* note 1, at 28.

federal judge.³⁷ This format resulted in three successful impeachments and removals of federal judges in the 1980s.³⁸

Another method for commencing impeachment occurs when the House receives a report from the Independent Counsel. As in any other impeachment proceeding, Congress is not bound by due process. Although grand jury testimony is to remain secret, the immediate release of the report of Independent Counsel Kenneth Starr ("Starr Report") illustrates even the House can act in direct defiance of this rule.³⁹ The House Judiciary Committee holds the responsibility of convening impeachment hearings and recommending impeachment resolutions.⁴⁰ The committee may choose to hold hearings, hear testimony, inspect evidence, and debate either publicly or in executive session.⁴¹ The charges against the target of the proceedings are compiled in a resolution, with each charge called an article.⁴²

Like any other piece of legislation, an impeachment resolution receives a pass or fail recommendation from its committee.⁴³ Then, the full House debates the proposed articles.⁴⁴ A bill of impeachment needs a simple majority to pass in the House.⁴⁵

2. The Senate

After enacting an impeachment resolution, House members are selected as attorneys or "managers" for trial in the Senate.⁴⁶ Either the Speaker or the Judiciary Committee select the House managers.⁴⁷ The accused party chooses his or her own independent defense attorneys. Supreme Court decisions affirm the Senate's great latitude in conducting the trial.⁴⁸ Though the Chief Justice of the Supreme Court

37. 28 U.S.C. § 372 (1994).

38. See GERHARDT, *supra* note 1, at 25. This procedure initiated the proceedings against Judges Claiborne, Hastings, and Nixon. See *id.*

39. See FED. R. CRIM. P. 6(E)(2) ("A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."); see also THE STARR REPORT, THE OFFICIAL REPORT OF THE INDEPENDENT COUNSEL'S INVESTIGATION OF THE PRESIDENT 38 (Pocket Books 1998) [hereinafter STARR REPORT].

40. See, e.g., CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 6 (1974). Although the impeachment proceeding against Andrew Johnson was driven by Radical Republicans on the Committee for Reconstruction, modern impeachment hearings, including those against President Richard Nixon, were handled by the House Judiciary Committee. See JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 212-13 (1978).

41. See LABOVITZ, *supra* note 40, at 180-84.

42. See THEODORE H. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 345-48 (1975). In 1974, the Judiciary Committee considered several articles of impeachment against President Nixon, including abuse of power, misusing public funds to improve his private estate in California, and mismanagement of the expansion of the Vietnam War into Cambodia. See *id.* at 310-11. Only the abuse of power and obstruction of justice articles, which directly related to Nixon's role in the cover up of White House involvement in the Watergate burglaries, were adopted by the committee. See *id.* at 345-48.

43. See GERHARDT, *supra* note 1, at 26.

44. See H.R. Res. 611, 105th CONG. (1998).

45. See U.S. CONST. art. I, § 2, cl. 5.

46. See 144 CONG. REC. D1217-01 (1998).

47. See *id.* "Managers" is the technical term given to the members of the House of Representatives who act as prosecuting attorneys in the Senate trial. See *id.*

48. See *supra* Section III.

presides over a trial of the President, a simple majority of the Senate can challenge and overturn his rulings.⁴⁹ Early trials, including that of Andrew Johnson, convened with the entire Senate sitting as a jury, a practice the Senate resumed for the trial of President Clinton.⁵⁰ Impeachment trials of the 1980s, however, found most of the work done in committee pursuant to Senate Rule XI,⁵¹ where a committee of senators hears the evidence before a vote in the full Senate.⁵² Conviction by the Senate requires a two-thirds majority vote.⁵³ Upon a guilty verdict, the Senate may remove a President from office and disqualify him or her from holding any future office.⁵⁴

III. THE AFTERMATH

Once a President has been removed from office, his options become limited. A conviction in any other court would lead to an appeal of the verdict, just as an indictment in any other court could lead to a dismissal motion. The Constitution grants to the House and Senate the "sole" power to bring and try impeachment, power which makes appeal from an indictment or conviction problematic.⁵⁵ Since no President has ever been removed from office, no President has appealed a guilty verdict. However, some case law from the sparse number of convictions of federal judges provides arguments that a removed President can seek relief from the judicial branch.

49. See U.S. CONST. art. I, § 3, cl. 6.

50. The Johnson impeachment grew from the lingering animosity of the Civil War and the assassination of Abraham Lincoln. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 261-63 (1973). Despite his mythic status in American history, Lincoln's reelection in 1864, and even renomination by the Republican party, were not foregone conclusions. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 713-17 (1988). Johnson, a Democrat from Tennessee who remained loyal to the Union, received the Vice-Presidential nomination to attract the votes of moderates. See *id.* at 717. After Lincoln's assassination, Johnson angered the congressional Radical Republicans with his more lenient stance on Reconstruction. See NOEL B. GERSON, *THE TRIAL OF ANDREW JOHNSON* 66-75 (1977). Congress passed the Tenure of Office Act, which prevented Johnson from replacing members of his cabinet without congressional approval. See HANS L. TREFOUSSE, *IMPEACHMENT OF A PRESIDENT* 43-45 (1975). Johnson correctly viewed the act as unconstitutional. See BERGER, *supra* note 50, at 280-85. The House impeached Johnson for violating the act through his dismissal of the Secretary of War. See DAVID MILLER DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 379-85 (1903).

The Johnson case offers an important lesson. Impeachment of a President must be reserved for the most serious of charges. See *id.* at 578-79. After his study of Johnson, DeWitt felt impeachment so serious a matter that he predicted, "[c]enturies will pass by before another President of the United States can be impeached, unless the offence [sic] of which he is accused is clearly non-political and amounts unmistakably to a high crime or misdemeanor." *Id.* at 579. Removal of Johnson for the political benefit of congressional leaders would have broken the separation of powers in favor of a more parliamentary system in which the executive served at the pleasure of the legislature. See TREFOUSSE, *supra* note 50, at 183; BERGER, *supra* note 50, at 295-96.

51. See *Nixon v. United States*, 938 F.2d 239, 240 (D.C. Cir. 1992).

52. See *id.*

53. See U.S. CONST. art. I, § 3, cl. 6.

54. See *id.*

55. See *id.*

A. Justiciability of an Appeal of an Impeachment Action: Case Law

1. *Ritter v. United States*⁵⁶

Halsted Ritter was the first defendant in an impeachment case to seek judicial review of his conviction.⁵⁷ In 1936, the Senate removed Ritter from his position as judge of a United States District Court for tax evasion and bribery.⁵⁸ He brought suit in the United States Court of Claims seeking back pay on the theory that the charges against him did not constitute a high crime or misdemeanor.⁵⁹ The Court of Claims simply refused to rule on the grounds that it lacked jurisdiction to hear the case.⁶⁰

In so doing, the Court of Claims considered constitutional theory and concluded they could not review the actions of the Senate:

But it is said the Senate acts as a high court of impeachment and that, being for the purposes of an impeachment trial as a court, if it acts without constitutional authority its judgements are a nullity. But what court is authorized to review its judgements and set them aside? The writers on constitutional law are unanimous in holding that there is none.⁶¹

Ritter indicated courts would duck review of impeachment rulings in deference to the judgments of Congress.⁶² In essence, judicial review of impeachment rulings became a political question. This view remained the dominant theory until the Supreme Court began shrinking the application of political question doctrine.

2. *Powell v. McCormack*⁶³

Adam Clayton Powell was prevented from taking his seat in the Ninetieth House of Representatives by a vote of the membership.⁶⁴ The House claimed the right to judge the qualifications of its members based on Article I, Section 5, Clause 1.⁶⁵ Powell was charged with financial impropriety and deemed unqualified to serve in the House.⁶⁶

The Supreme Court disagreed and ordered Powell's exclusion expunged.⁶⁷ While the House had the ability to judge the qualifications of its members, those

56. 84 Ct. Cl. 293 (1936).

57. *See Ritter*, 84 Ct. Cl. at 294.

58. *See id.* at 293-94.

59. *See id.* at 294.

60. *See id.* at 296-98.

61. *Id.* at 296.

62. *See Ritter v. United States*, 84 Ct. Cl. 293 (1936).

63. 395 U.S. 486 (1969).

64. *See id.* at 490.

65. *See id.* at 491.

66. *See id.* at 492.

67. *See id.* at 512.

qualifications were restricted to those listed in Article I, Section 2, Clause 2: age and inhabitancy.⁶⁸ This decision contained several congruencies to an impeachment review. First, the Court did not shy away from overturning a political decision of the Congress.⁶⁹ Before *Powell*, this certainly would have been dismissed as a political question.⁷⁰ *Powell*, however, established that the Court could render decisions on political issues concerning the political branches.⁷¹ The Constitution expressly granted Congress the right to screen its membership and the Court chose to review that right.⁷²

The Court's decision to review and overturn a congressional decision constitutionally committed to the legislative branch, gives hope to a President seeking review of an impeachment action. Much like the qualification clause, the Constitution grants to Congress impeachment power through the impeachment and conviction clauses.⁷³ If the Court can hear a case of legislative action on a member of the legislative branch, it might also hear a case of legislative action on a member of the executive branch. Indeed, the Court may be more likely to consider an interbranch dispute rather than an intrabranched conflict, as in *Powell*; this would allow the Court to officiate between two branches rather than dictate to one branch alone.⁷⁴

Second, *Powell* established the Court could reverse a punitive decision by Congress.⁷⁵ Exclusion from taking a seat in the House punished Powell by denying him his right to hold office.⁷⁶ Powell also lost the seniority rights and pension accrual that came with his seat.⁷⁷ This same deprivation of rights and privileges would support a review of a Senate conviction of a President. A removed President can lose not only the office of the presidency and the right to hold future political positions, but also pension benefits and Secret Service protection.⁷⁸

Third, the *Powell* Court refused to question the methods by which the House

68. *See id.* at 537-39.

69. *See Powell v. McCormack*, 395 U.S. 486, 518 (1969).

70. *See Colegrove v. Green*, 328 U.S. 549 (1946). In *Colegrove*, the Supreme Court refused to hear a challenge to legislative district lines that denied one person, one vote. *See id.* at 550. *Colegrove* concerned the apportionment of the congressional districts of Illinois. *See id.* Illinois gerrymandered its apportionment so that urban districts contained over four times as many people as rural districts. *See id.* at 555. The Court compiled evidence that showed that most of the states adopted this practice; since rural interests dominated most state legislatures, there was little chance that the states would correct this imbalance on their own. *See id.* at 557-60. This essentially was the same issue presented in *Baker v. Carr*, 369 U.S. 186 (1962). *Baker* produced a different result for two reasons. First, *Baker* concerned a reapportionment of state legislative districts, not federal. *See id.* at 187. Although both cases would have ultimately ordered action from state legislatures, the method in *Baker* was less confrontational. Second, and most importantly, the Court shifted left between 1946 and 1969, with the justices more willing to venture into political questions and less likely to duck issues. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

71. *See Powell v. McCormack*, 395 U.S. 486, 518 (1969).

72. *See id.* at 548.

73. *See U.S. CONST.* art. I, § 2, cl. 5; art. I, § 3, cl. 6.

74. *See, e.g., INS v. Chada*, 462 U.S. 919 (1983); *Mistretta v. United States*, 488 U.S. 361 (1989).

75. *See Powell v. McCormack*, 395 U.S. 486, 550 (1969).

76. *See id.* at 486.

77. *Powell v. McCormack*, 395 U.S. 486, 492 (1969).

78. *See U.S. CONST.* art. I, § 3, cl. 7.

arrived at its decision: the hearings in committee and the votes on the floor.⁷⁹ The Court focused instead on the final result. Fourth, the Court did not avoid a decision on grounds of mootness. By the time the case reached the Supreme Court, Powell had already been reelected to the ninety-first Congress.⁸⁰ Although he could not be retroactively seated in the adjourned ninetieth Congress, Powell did have his back pay and seniority reinstated.⁸¹

Mootness would constitute a primary argument against judicial review of a Senate conviction of a President. As a policy matter, not even a convicted President could argue for a revolving door in the presidency whereby a President is convicted, a Vice-President is installed, and the deposed President then resumes the office after judicial review.⁸² *Powell*, however, illustrates the point that a convicted President would have some relief to gain from judicial review of a Senate conviction other than restoration to the presidency.

3. *Nixon v. United States*⁸³

The question of judicial review of an impeachment proceeding finally received a more modern ruling in *Nixon v. U.S.*⁸⁴ Walter Nixon, a federal district court judge from Mississippi, was indicted in a criminal trial for influencing a local district attorney not to prosecute a family friend.⁸⁵ After his conviction in criminal court and sentence to prison, Nixon refused to resign from the United States District Court, unlike his Presidential namesake.⁸⁶ The House impeached Judge Nixon based on his earlier conviction and for bringing “disrepute on the [f]ederal judiciary.”⁸⁷ The Senate, pursuant to Impeachment Rule XI, conducted a committee review of the charges against Nixon. Then, the committee reported to the full Senate.⁸⁸ After considering the record the Senate voted to convict Nixon.⁸⁹

On appeal, Nixon argued Rule XI unconstitutionally delegated the authority to try him to a committee, and thus prevented the whole Senate from having full participation in the trial.⁹⁰ Instead of ruling on Rule XI’s constitutionality, the Court

79. See *Powell*, 395 U.S. at 511-12. The *Powell* Court did not order the House of Representatives to alter its method of holding hearings on the exclusion resolution for any future exclusion cases. See *id.* The decision instead reversed the product of those hearings and the action by the full House. See *id.*

80. See *id.* at 495. A possible suit by a President already removed from office by vote of the House and Senate would first face the question of mootness. See *id.* Even though the removed President may not be returned to office, he still, like Powell, could receive his back salary, and have his pension, office staff, and Secret Service protection restored. See *id.*

81. See *Powell*, 395 U.S. at 550.

82. See BLACK, *supra* note 40, at 53-54.

83. 506 U.S. 224 (1993).

84. See *Nixon*, 506 U.S. at 224.

85. See *Nixon v. United States*, 938 F.2d 239, 240 (D.C. Cir. 1991).

86. See Brendan C. Fox, *The Justiciability of Challenges to the Senate Rules of Procedure for Impeachment Trials*, 60 GEO. WASH. L. REV. 1275 (1992) for a comprehensive overview of the facts of the case.

87. *Nixon v. United States*, 506 U.S. 224, 227 (1993).

88. See *id.* at 227.

89. See *id.* at 228.

90. See Fox, *supra* note 86, at 1283-84. Nixon argued the Senators on the committee hearing evidence in any impeachment trial pursuant to Rule XI are unlikely to muster the two-thirds vote necessary to convict. See *id.*

deemed the claim a political question and refused to resolve it.⁹¹

The Court reasoned the word “try” in the Senate’s impeachment clause grant did not impose any limits on the Senate’s ability to frame its own proceedings.⁹² Further, Rule XI did not infringe upon Nixon’s right to be tried by the Senate because “try” was not subject to any further constitutional abridgements in the text of the Constitution—a distinction from the court’s qualification in *Powell*.⁹³

A challenge of a presidential impeachment would be distinguishable from the *Nixon* case on two grounds, both dealing with separation of powers. Such a case would pit the executive branch against the legislative, while *Nixon* called for the judiciary to review the removal of one of its own members.⁹⁴ A disturbance in the separation of powers concerned the *Nixon* court. Once a federal judge enters office, impeachment is the only direct check the legislative branch has on the judiciary.⁹⁵ Judicial overturning of the sole check on the judiciary, the Court reasoned, would be improper.⁹⁶ A similar argument would be inapplicable to the President. The legislature has numerous checks on the presidency aside from the impeachment process.⁹⁷ The Constitution itself treats a presidential impeachment trial differently than any other.⁹⁸ By naming the Chief Justice as the presiding officer at an impeachment trial of the President, the Constitution forces upon the judicial branch an active role in this executive/legislative dispute.⁹⁹ While the constitutionality of judicial review of a removal of a judicial branch official would obstruct the separation of powers, such a review of an executive branch removal would be highly consistent.¹⁰⁰

Nixon did not challenge the constitutional standard of impeachment and claim that his offenses did not rise to “high crimes and misdemeanors,” nor did *Nixon* raise a separation of powers issue.¹⁰¹ The appeal to reverse the Senate verdict was based on the inadequacy of the Senate’s internal procedures.¹⁰² This was a decision of procedure and not of law; the Court cannot question how the Senate goes about convicting, but left unresolved the issue of reviewing the final verdict. In this sense, *Nixon* is consistent with *Powell*, where the Court ruled on the end product, not the means to the end.

91. *Nixon v. United States*, 506 U.S. 224, 237-38 (1993).

92. *See id.*

93. *See id.* at 229-30.

94. *See id.* at 226.

95. *See Nixon v. United States*, 938 F.2d 239, 243 (D.C. Cir. 1992).

96. *See id.* at 244; *see also* THE FEDERALIST NOS. 65 and 66 (Alexander Hamilton).

97. *See* U.S. CONST. art. I, § 7, cl. 3 (overriding of veto); art. II, § 2, cl. 2 (power to advise and consent to nominations, approve treaties); THE FEDERALIST No. 51 (James Madison).

98. *See* U.S. CONST. art. I, § 3, cl. 6.

99. *See id.*

100. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385 (1990); *Mistretta v. United States*, 488 U.S. 361 (1989); *INS v. Chada*, 462 U.S. 919 (1983).

101. *See Nixon v. United States*, 506 U.S. 224 (1993).

102. *See id.* at 224.

B. Justiciability of an Appeal of an Impeachment Action: Legacies of the Founders

Judicial review of a presidential impeachment conviction would be a question of first impression. Impeachment was one of the only judicial powers given to another branch in the Constitutional Convention.¹⁰³ Early versions of the Constitution gave authority over impeachment trials to the Supreme Court.¹⁰⁴ Ultimately, the Court lost this authority, primarily since the President ultimately could be tried by the justices he appointed himself.¹⁰⁵ James Madison and Charles Pickney disagreed, arguing that Congress would remove the President “under the influence of heat and faction,” which in fact nearly happened to Andrew Johnson and Bill Clinton.¹⁰⁶

While the Framers ultimately placed removal authority in the legislative branch, they did not intend for it to run unbridled.¹⁰⁷ The Convention rejected removal for “maladministration” in favor of the more technical “high crimes and misdemeanors.”¹⁰⁸ The removal power was to be exercised carefully. Professor Raoul Berger, the first author to articulate the case for judicial review of impeachment decisions based on *Powell*, analogizes that just as the judiciary is bound by self-restraint in keeping judicial power within bounds, so too must the Senate use self-restraint in impeachment trials.¹⁰⁹ This self-restraint, however, may be too much to ask from elected partisan officials. The alternative to Senate self-restraint is judicial review.¹¹⁰

Finally, the meaning of the word “sole” lies at the heart of any argument for judicial review of a Senate conviction of the President.¹¹¹ Article I, Section 2, Clause 5 gives the House the “sole” power of impeachment; Article I, Section 3, Clause 6 gives the Senate the “sole” power to try impeachments.¹¹² This seemingly ends the issue. *Ritter* reasoned that “sole” meant “no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment.”¹¹³

Ultimately, the Supreme Court is the final arbiter of the meaning of the Constitution.¹¹⁴ This concept finds its roots in *Marbury v. Madison* in which the Court recognized its duty to act as interpreter of the Constitution¹¹⁵ and was reaffirmed in *Baker v. Carr*, the leading modern case on justiciability of the political question.¹¹⁶ The judiciary determines if any branch acts beyond its constitutional mandate by “[d]eciding whether a matter has in any measure been committed by the

103. See THE FEDERALIST NO. 65 (Alexander Hamilton).

104. See *id.*

105. See *id.*; THE FEDERALIST NO. 66 (Alexander Hamilton); BERGER, *supra* note 50, at 112-13.

106. BERGER, *supra* note 50, at 112-14, 252.

107. See *id.* at 103-21.

108. See *id.* at 107.

109. See *id.* at 118.

110. See *id.* at 118-21.

111. See U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cl. 6.

112. See U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cl. 6.

113. *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936).

114. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

115. See *id.* at 177.

116. 369 U.S. 186 (1962).

Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter."¹¹⁷ Therefore, the Court determines the parameters of a branch's authority and whether the branch has successfully stayed within the limits of their enumerated powers.¹¹⁸ As with *Powell* and *Nixon*, *Baker* supports the proposition that the Court cannot question congressional procedure in arriving at its decision, but may question the end result of the congressional action.¹¹⁹

Rejection of judicial review and recognition of the "sole" right of Congress to conduct impeachment proceedings denies the defendant in an impeachment case the right to appeal. Unlike criminal courts, there are no appellate levels to Congress. Alexander Hamilton questioned the lack of judicial review in Federalist 66 when he wrote, "the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important and well-established maxim which requires a separation between the different departments of power."¹²⁰ The complete grant of the authority to remove the President and subsequent immunity from judicial review is incongruent with the checks and balances foundation undergirding the U.S. Constitution.¹²¹

Justice White in a *Nixon* concurrence suggests an alternate reading of "sole."¹²² Under an alternative reading of "sole," there is no violation of the separation of powers, only an interbranch dispute. "Sole" limits the House from taking the Senate's power and vice versa; the danger lies in encroachment from the other House, not a coordinate branch.¹²³ Such a reading led Justice White to conclude:

That the word "sole" is found only in the House and Senate Impeachment Clauses demonstrates that its purpose is to emphasize the distinct role of each in the impeachment process. As the majority notes, the Framers, following English practice, were very much concerned to separate the prosecutorial from the adjudicative aspects of impeachment. Giving each House "sole" power with respect to its role in impeachments effected this division of labor. While the majority is thus right to interpret the term "sole" to indicate that the Senate ought to "function independently and without assistance or interference, it wrongly identifies the Judiciary, rather than the House, as the source of potential interference"¹²⁴

117. *Id.* at 211.

118. *See* BERGER, *supra* note 50, at 118-19.

119. *See Baker*, 369 U.S. at 331. The Supreme Court did not specify how the Tennessee legislature should draw their legislative district lines but only to redraw them equitably. *See id.* at 325.

120. THE FEDERALIST NO. 66 (Alexander Hamilton).

121. *See* BERGER, *supra* note 50, at 117-18.; THE FEDERALIST NO. 48 (James Madison).

122. *Nixon v. United States*, 506 U.S. 224, 241 (1993) (White, J., concurring).

123. *See id.*

124. *Id.* at 241-242, (White, J., concurring) (citations omitted).

IV. IMPORTANCE OF THE ISSUE: THE CASE OF PRESIDENT CLINTON

A. *The President's Claim for Relief*

Analysis of the impeachment clauses, the cases interpreting them, the congressional powers surrounding them, and historical tradition all leave open the possibility that an impeached President may seek judicial review of congressional action, particularly action driven by an independent counsel.¹²⁵ President Clinton and his legal team actively considered filing such a suit shortly after his impeachment in December 1998.¹²⁶

A presidential suit to block congressional action presents a two part argument that would force Congress into mutually exclusive defenses:

First, federal courts have jurisdiction to review impeachment proceedings. The judiciary, in its role as final arbiter of the meaning of the Constitution, can rule on whether the Congress correctly interpreted the clause "high crimes and misdemeanors."¹²⁷ If the Congress misapplied the impeachment clause, sanctions against the President should be overturned.

In the alternative, the grant to the Independent Counsel represents an unconstitutional delegation of pure legislative authority to the executive branch. The Independent Counsel must report evidence of impeachable offenses.¹²⁸ Hence, the Independent Counsel must decide if presidential behavior is a "high crime or misdemeanor," and interpret that phrase.¹²⁹ However, this represents a violation of the separation of powers in that it allows a branch to judge itself. Thus, any punitive action taken by Congress based solely on information provided by the Independent Counsel must be overturned.

Congress must defend the two arguments with inherently illogical responses: (1) Only Congress may interpret the impeachment clauses, but (2) the executive and judicial branches may interpret the impeachment clauses.

B. *The Grant to the Independent Counsel*

The Independent Counsel sent a referral to Congress on September 11, 1998,

125. See BERGER, *supra* note 50, at 300-01. "[A]s Voltaire said of God: if judicial review did not exist, it would have to be invented." *Id.* at 301.

126. See Ruth Marcus & Helen Dewar, *Clinton Team Considers Legal Fight Against Trial; Lawmakers on Both Sides Call for Quick Resolution*, WASH. POST, Dec. 21, 1998, at A1.

127. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

128. See 28 U.S.C. §595(c) (1994).

129. See *supra* note 162 for a comparison between the Starr Report and the final articles of impeachment approved by the Judiciary Committee and the full House. The impeachment resolution approved by the Judiciary Committee almost completely matched the offenses deemed impeachable by the Starr Report, and the committee relied totally on the Starr Report evidence to substantiate the articles. The Independent Counsel was the *de facto* drafter of the impeachment resolutions, and determinant of impeachable offenses. See *id.*

pursuant to § 595(c) of the Ethics in Government Report.¹³⁰ Popularly called the Starr Report, the document outlined eleven impeachable actions including perjury, obstruction of justice, and abuse of power.¹³¹

The Independent Counsel investigation of President Clinton began in 1994 as an inquiry into the Clintons' real estate dealings in Arkansas.¹³² Judge Starr and his predecessor, Robert Fiske, gradually expanded the scope of the investigation through requests to the special division.¹³³ The judiciary approved applications to allow the Independent Counsel to probe the business dealings of Clinton associates which required testimony from the President and other White House officials well before the investigation of the Lewinsky affair began.¹³⁴ By President Clinton's first tryst with White House intern Monica Lewinsky, the Independent Counsel inquiry was already more than a year old.¹³⁵

The Ethics in Government Act weathered a constitutional challenge in *Morrison v. Olson*.¹³⁶ The case arose when the Environmental Protection Agency ("EPA") refused to provide documents to the House on grounds of executive privilege.¹³⁷ DOJ officials were investigated for allegedly giving false testimony to Congress and obstructing justice in their treatment of the documents.¹³⁸ Olson argued the Ethics in Government Act was unconstitutional.¹³⁹ Additionally, Olson contended that because the Independent Counsel was an official of the executive branch, she could not be appointed by anyone other than the President.¹⁴⁰ Thus, Olson claimed, the appointment of the Independent Counsel by a panel of the judiciary was inappropriate.¹⁴¹

The Supreme Court upheld the Ethics in Government Act.¹⁴² The Appointments Clause of the Constitution grants the President the authority to appoint "principle officers" of the United States, while giving Congress the power to vest the appointment of "inferior officers" in the courts.¹⁴³ Deeming the Independent Counsel an inferior officer,¹⁴⁴ the Court held that Congress did not overstep its authority in granting the special division the power to appoint the Independent Counsel.¹⁴⁵

Morrison also established that the Attorney General has the direct authority to

130. See *id.*; STARR REPORT, *supra* note 39, at 21.

131. See STARR REPORT, *supra* note 39, at 21-22.

132. *United States v. Tucker*, 78 F.3d 1313, 1315 (8th Cir. 1996).

133. See STARR REPORT, *supra* note 39, at 32-33.

134. See *United States v. McDougal*, 940 F. Supp. 224 (E.D. Ark. 1996).

135. See STARR REPORT, *supra* note 39, at 69. The report states that the first meeting between President Clinton and Monica Lewinsky occurred during the government shutdown in November 1995, one year after the original Whitewater inquiry began. See *id.* at 71-74.

136. 487 U.S. 654 (1986).

137. See *id.* at 665.

138. See *id.* at 666.

139. See *id.* at 668.

140. See *id.* at 673.

141. See *id.* at 668-70.

142. See *Morrison v. Olson*, 487 U.S. 654, 669 (1986).

143. U.S. CONST. art. II § 2, cl. 2. This clause also authorizes the Special division to establish the jurisdiction of the Special Prosecutor. See *id.*

144. See *Morrison*, 487 U.S. at 672.

145. See *id.* at 671.

remove the prosecutor from office.¹⁴⁶ This is significant in that no precedent exists for a challenge of an Independent Counsel's purview in investigating or recommending the impeachment of a President. Additionally, *Morrison* affirmed the ability of the special division to perform "administrative" functions regarding the Office of Independent Counsel, including declaring any investigation closed.¹⁴⁷ "[T]he functions that the Special Division is empowered to perform are not inherently 'executive'; indeed, they are directly analogous to functions federal judges perform in other contexts, such as deciding whether to allow disclosure of matters occurring before a grand jury."¹⁴⁸ Before sending the Starr Report to Congress, Starr asked the special division for permission to release evidence obtained from the grand jury, evidence that a prosecutor cannot release without court permission.¹⁴⁹ This gives the judicial branch a role in defining an impeachable offense. The special division agreed the evidence Starr obtained was sufficient to justify its release in the Starr Report.¹⁵⁰ In so doing, the special division determined the evidence did rise to the level of "high crimes and misdemeanors."¹⁵¹ This constitutes a violation of separation of powers.

In his dissent in *Morrison*, Justice Scalia urged the Ethics in Government Act be struck down.¹⁵² Because the Independent Counsel exercised executive powers and was controlled by someone other than the President, the Act vested executive powers improperly.¹⁵³ To that end, Scalia argued the statute would weaken the presidency by allowing the prosecutor to conduct impeachment investigations in lieu of an investigation by a Congress unwilling to accept the political risk of such a venture.¹⁵⁴

How much easier it is for Congress, instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds—or, for that matter, how easy it is for one of the President's political foes outside of Congress—simply to trigger a debilitating criminal investigation of the Chief Executive under this law.¹⁵⁵

The appointment of an Independent Counsel may be initiated by a request to the Attorney General to investigate the President, and the Independent Counsel can continually expand the jurisdiction of the probe any time the prosecutor encounters evidence tangential to the original scope of the investigation.¹⁵⁶ President Clinton

146. See *id.* at 682.

147. See *id.*

148. *Morrison v. Olson*, 487 U.S. 654, 681 (1986).

149. See FED. R. CRIM. P. 6(E); STARR REPORT, *supra* note 39, at 38 (detailing the application of the Office of Independent Counsel for release of the grand jury material).

150. See STARR REPORT, *supra* note 39, at 38.

151. See *id.*

152. See *Morrison*, 487 U.S. at 697-734 (Scalia, J., dissenting).

153. See *id.* at 705.

154. See *id.* at 713.

155. *Id.*

156. History best illustrates this danger. Almost every presidency contains numerous closet skeletons that a determined probe could uncover. Given the opportunity to investigate one aspect of a presidential administration, a prosecutor could soon expand jurisdiction to include the entire political and personal background of the President. Consider the presidencies between World War I and Watergate:

weathered such an investigation.¹⁵⁷

Investigation by Independent Counsel poses a greater danger than investigation by a congressional committee. As University of Tulsa Law School Dean Martin H. Belsky argued:

Lyndon Johnson: LBJ's road to the White House contained abundant dark periods. Johnson won election to the Senate from Texas in 1948 by eighty-seven votes out of more than nine hundred thousand cast, a margin that earned him the sarcastic nickname, "Landslide Lyndon." See DORIS KEARNS, *LYNDON JOHNSON AND THE AMERICAN DREAM* 101 (1997). The actual voting contained numerous examples of voter fraud on behalf of the Johnson campaign, including margins of one hundred to one in some counties. See, e.g., ROBERT A. CARO, *MEANS OF ASCENT: THE YEARS OF LYNDON JOHNSON* 308-13, 318-21 (1990). Johnson's relationship with the Brown and Root Construction Company raised problems of suspicious campaign contributions and questionable awards of government contracts. See ROBERT A. CARO, *THE PATH TO POWER* 458-68, 577-78 (1983).

John Kennedy: Camelot under the scrutiny of an independent counsel may have been the most heavily investigated administration of all. JFK's 1960 presidential campaign weathered allegations of ties to organized crime and of voting fraud, especially in the West Virginia primary and in Richard Daley's Chicago. See RICHARD REEVES, *PRESIDENT KENNEDY: PROFILE OF POWER* 110 (1993); SEYMOUR HERSCH, *THE DARK SIDE OF CAMELOT* 90-141, 165-67 (1997). Kennedy's personal life was also suspect. Among his legendary rumored affairs was a liaison with a suspected East German spy in 1963. See *id.* at 387-88, 390, 398-400.

Dwight Eisenhower: While in command of the allied forces in Europe during World War II, Eisenhower had an alleged affair with a subordinate member of his staff, Kay Summersby. See PIERS BRENDEN, *IKE: HIS LIFE AND TIMES* 124 (1986). As President, Eisenhower covered up the role of the military in the crash of a U2 spy plane inside the Soviet Union. See STEPHEN E. AMBROSE, *EISENHOWER: VOLUME TWO, THE PRESIDENT* 572-75 (1984).

Harry Truman: Truman's early political career was sponsored by Kansas City political boss Tom Pendergast, who helped Truman become an executive of Kansas City's Jackson County, and later United States Senator from Missouri. See DAVID MCCULLOUGH, *TRUMAN* 160-84, 204 (1992). The Pendergast organization participated in the typical city machine activities, including acquisition of government construction contracts awarded by Truman's county commission. See *id.*

Calvin Coolidge/Warren Harding: Harding died in 1923 just as the Teapot Dome scandal began to reach critical mass. See BURT NOOGLE, *TEAPOT DOME: OIL AND POLITICS IN THE 1920S* 58 (1962). Had he lived, Harding may have faced charges from his involvement in allocating the use of federal lands for oil drilling by his campaign contributors. See *id.* at 47. Coolidge as Vice-President may have attracted allegations similar to those directed at George Bush, Vice-President during Iran-Contra. See ROBERT H. FERRELL, *THE PRESIDENCY OF CALVIN COOLIDGE* 44-45 (1998).

Woodrow Wilson: While campaigning for ratification of the Treaty of Versailles in 1919, Wilson suffered a stroke that paralyzed his left side. See EDWIN A. WEINSTEIN, *WOODROW WILSON: A MEDICAL AND PSYCHOLOGICAL BIOGRAPHY* 353 (1981). With her invalid husband unable to fulfill his duties, Edith Wilson shut the President off in a sick room in the White House and channeled the government through her. See *id.* at 355-61.

157. Such a "connect the dots" investigation led to the proceedings against President Clinton. The Office of Independent Counsel's investigation began with the Clintons' involvement in the Whitewater land deal. See JAMES B. STEWART, *BLOOD SPORT: THE PRESIDENT AND HIS ADVERSARIES* 95-105, 133, 375-402 (1996).

How does a 1978 land deal produce a 1998 impeachment? The investigation of the Clintons' involvement in Whitewater led to requests for expansion of the jurisdiction of the Office of Independent Counsel to include a wide dragnet into the backgrounds of the Clintons and their friends. See *id.*; see also *United States v. McDougal*, 137 F.3d 547 (8th Cir. 1998); *United States v. Tucker*, 137 F.3d 1016 (8th Cir. 1998); *United States v. McDougal*, 92 F.3d 701 (8th Cir. 1996); *United States v. Tucker*, 78 F.3d 1313, (8th Cir. 1996); *Resolution Trust Corp. v. McDougal*, 158 F.R.D. 1 (D.D.C. 1994); *United States v. Hubbell*, 1999 WL 26878 (D.D.C. 1999); *United States v. McDougal*, 940 F.Supp. 224 (E.D.Ark. 1996).

None of these scandals found their way into the Independent Counsel's referral of impeachable offenses to the House. Because of their existence, however, a prosecutorial staff existed and was ready to act immediately on the Lewinsky case. See STARR REPORT, *supra* note 39, at 22-24. The jurisdiction eventually granted the Office of Independent Counsel ran the gamut from the President's (and First Lady's) business dealings prior to assuming the presidency to his conduct of his official duties while President to his personal affairs while in office. In short, all aspects of the Clintons' public and their private lives while in office were subject to investigation. Now consider the travails of former Presidents as outlined in the previous footnote. History reveals that the presidency has grown so complex in the twentieth century that no person can have the career necessary to win the office and then execute the office successfully without encountering at least the appearance of impropriety of the level to trigger some call for an independent counsel investigation. Once initiated, the experiences of the Clintons prove a determined prosecution can cast light into the deepest shadows of a President's life.

[S]pecial prosecutors or independent counsel, and their grand juries, selected by and under the supervision of the federal courts, have broad power to investigate the President. They and their staffs secure evidence, subpoena witnesses, organize testimony and exhibits, make plea bargains, and attempt to frame public opinion by selective leaks and official reports. They also provide the raw material for the official impeachment process. Information unavailable to an impeachment inquiry directly can be turned over to the inquiry by the independent counsel. The impeachment process described in the Constitution, involving the Congress, is at the end, and not the beginning of any investigation. The disputes over the impeachment process do not occur in the official political arena of the Congress; they occur in the grand juries and the courts . . . the technical rule seems to be that issues involving impeachment are non-justiciable, and the courts, particularly the Supreme Court, are not supposed to get involved. The legal reality is that the courts, and especially the Supreme Court, have become the arena for investigating the President. Their decisions determine the nature of any investigation, its scope, the evidence available, the rights of the President and even the identity of the chief inquisitor.¹⁵⁸

Once appointed, an Independent Counsel is required by statute to report *any* evidence of impeachable offenses.¹⁵⁹ With the concurrence of the special division, the prosecutor can refer her subject to Congress for impeachment proceedings.¹⁶⁰ This necessitates an interpretation of “high crimes and misdemeanors” by the Independent Counsel *before* making the referral. The Independent Counsel must decide if the offenses of which she accuses the President are serious enough to deserve impeachment proceedings by Congress. Otherwise, the Independent Counsel would make no such referral and deposit her findings with the Archivist of the United States.¹⁶¹ Congress implicitly recognizes this surrender of authority to interpret “high crimes and misdemeanors” through its actions on impeachment.¹⁶² The empirical record of Congress on impeachment reveals Congress now expects the beginnings of impeachment proceedings from the other branches; it has delegated away its

158. Martin H. Belsky, *Investigating The President: The Supreme Court and the Impeachment Process*, 34 TULSA L.J. 289, 305 (1999).

159. See 28 U.S.C. § 595(c) (1994).

160. See *id.*

161. See *id.* § 594(k).

162. All of the offenses alleged in the articles of impeachment were also deemed impeachable conduct by the Starr Report. Article I accused the President of perjurious testimony before the grand jury, and article II charged him with obstruction of justice. See H.R. Res. 611, 105th Cong. (1998). The Starr Report alleged eleven possible impeachable ground. See STARR REPORT, *supra* note 39, at 296-97. Ground 2 formed the basis for impeachment article I. Compare *id.* at 319-327, with H.R. Res. 611, 105th CONG. (1998). Grounds 5 through 10 became article II. Compare STARR REPORT, *supra* note 39, 346-402, with H.R. Res. 611, 105th CONG. (1998). Grounds 1, 2 and 4 regarding perjury in a civil deposition and ground 11 regarding abuse of power translated into two articles proposed by the Judiciary Committee but rejected by the full House. See STARR REPORT, *supra* note 39, at 296-97; see also Peter Baker and Juliet Eilperin, *GOP Blocks Democrats' Bid to Debate Censure in House; Panel Votes Final, Trimmed Article of Impeachment*, WASH. POST, Dec. 13, 1998, at A1.

authority.¹⁶³

Independent Counsel Kenneth Starr displayed the new power of his office in the impeachment of President Clinton.¹⁶⁴ The House of Representatives accepted his recommendations.¹⁶⁵ The final articles of impeachment adopted by the House on December 15, 1998, mirrored the grounds for impeachment endorsed by Starr.¹⁶⁶ Moreover, the House accepted the Starr Report testimony as the factual record on which to base the articles.¹⁶⁷ In practice, as well as theory, Congress abdicated its impeachment responsibility.

C. The Defense

A challenge to an impeachment verdict would force congressional defenders of the action into an untenable defense. To rebut the justiciability of an appeal to overturn congressional action, the defense must claim the Constitution granted Congress the "sole" ability to judge impeachments.¹⁶⁸ No appeal can be heard because only the legislative branch can determine the meaning of "high crimes and misdemeanors." This ability cannot be usurped or encroached upon by another branch. To defend the investigation of the Independent Counsel, the defense must argue that the prosecutor, an executive branch official, has the authority to interpret "high crimes and misdemeanors" in evaluating what conduct is referable to the House under § 595(c) of the Ethics in Government Act.¹⁶⁹ Further, the defense must contend the special division can endorse the interpretation of the Independent Counsel by allowing the release of grand jury evidence. If the Congress can delegate its exclusive authority, the court can review it. That would lead, inevitably, to an appeal of the merits of Congress's decision.

V. CONCLUSION

The events of 1998 and 1999 moved the potential of an appeal of a presidential impeachment from the unthinkable to the realm of the possible. Before challenging an impeachment verdict from Congress, a President must consider a plethora of political factors: the effect of the challenge on the development of his policies, the fate of his party in future elections, the inevitable fluctuations in prestige of the nation in the eyes of foreign countries, and the impact on the office of the presidency.

163. See *supra* note 162. Since enacting the Ethics in Government Act, Congress has not initiated an impeachment proceeding on its own, waiting instead for referrals from the Independent Counsel or the Judicial Conference. See *id.*; see also *supra* notes 37-38. This has occurred in spite of the exponential growth of the federal government and the heightened interest of the media in creating atmospheres of scandal.

164. See *supra* note 162.

165. See *id.*

166. See *id.*

167. See *id.*

168. See U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cl. 6.

169. 28 U.S.C. § 595 (1994).

Should such a case proceed, the judiciary would face a constitutional question unparalleled in American history: a choice between the survival of a presidency and the credibility of Congress. No good can come of such a choice.

Challenge of a House impeachment seems much more likely than of a Senate conviction. As the impeachment of President Clinton illustrated, the narrowest majority can produce an impeachment. Driven by a determined Independent Counsel, these impeachments can result from curious grounds. Impeachment should not become a constitutional dead letter, but neither should it become just another weapon of political struggle. Injection of the Independent Counsel into impeachment has made it just that.

Before an appeal occurs, each branch should take steps to prevent it. The judiciary must take an unequivocal stand on the justiciability of all impeachment appeals, including those from the executive branch. The President and the DOJ must prepare tough regulations to accomplish the spirit of the Ethics in Government Act within the executive branch, without the clumsy mechanisms of the Office of Independent Counsel.

Finally, the legislative branch must abolish the Independent Counsel statute. The Independent Counsel enabling statute expires on June 30, 1999, and should not receive renewal. If constitutional theory accepts that a President cannot be indicted in court and may only be charged with an offense through the impeachment process, then Congress alone should investigate the President. The end product of a DOJ investigation is a criminal indictment. If a President cannot be charged this way, the DOJ should have no role in the investigation of a President, through the Independent Counsel or otherwise. If a President can be punished by Congress alone, then Congress must conduct the prosecution itself. To abate somewhat political influence, investigations of the President should be placed under the purview of the General Accounting Office. Congress would be free to conduct its own inquiry with or without the input of the Independent Counsel. The alternative is the continued potential for constitutional crisis.

Hugh Brown

